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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1951.

No. _____

STANOLIND OIL AND GAS COMPANY, *Petitioner,*

vs.

WEST EDMOND HUNTON LIME UNIT,
a Body Politic and Corporate,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Tenth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on December 21, 1951.

Opinion Below.

The opinion of the Court of Appeals (R. 155) is not yet reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on December 21, 1951 (R. 167). A petition for rehearing filed

on January 9, 1952, (R. 167) was denied on January 16, 1952 (R. 168). The jurisdiction of this Court is invoked under 28 U. S. C., Sections 1254 (1) and 2101.

Question Presented.

Whether it is a denial of due process under the Fifth Amendment for an appellate court to decide finally the merits of a case on an issue of fact never raised or litigated in the trial court when it is clear that remanding the case for further proceedings on the issue might result in a different conclusion.

Statute Involved.

Sections 286.1-286.17 of Title 52, Okla. Stats. Anno.

Statement.

This petition is concerned exclusively with the question of whether the court below erred in finally deciding rather than remanding this case.

Petitioner, appellee in the court below, owned an oil and gas well, referred to as "Stanolind-Christner No. 2," located in the West Edmond Field of Oklahoma (R. 68, item 3). The West Edmond Field contains two producing formations—the Bartlesville Sand and the Hunton Lime. The Bartlesville Sand lies above the Hunton Lime and the two are separated by impermeable substances (R. 68, item 2). Petitioner's well is dually completed in both formations in such a manner as to produce oil and gas from the Hunton through the tubing and gas and distillate from the Bartlesville through the annular space between the tubing and casing (R. 69, item 4). The dual completion of a well whereby two formations are produced through the same well bore is a common practice in the oil industry (R. 69, item 5).

Petitioner so produced the Stanolind-Christner No. 2 well prior to October 1, 1947 (R. 69, item 4).

Sections 286.1 to 286.17 of Title 52, Okla. Stats. Anno., sometimes referred to as the "fieldwide unitization law" of Oklahoma, establishes a procedure for the unitized management, operation and development of a common source of supply of oil and gas. It is a conservation measure designed to increase the ultimate recovery of those resources from the oil and gas pools of the state. The constitutionality of the statute as a permissible delegation of police power was recently upheld by the Supreme Sourt of Oklahoma and the case is now pending on appeal in this Court.[1]

Effective October 1, 1947, respondent was formed under the statute for a single purpose—to conduct unitized operations of the *Hunton Lime* formation of the West Edmond Field (R. 70, item 7). On that date, petitioner conveyed and delivered possession of the Christner No. 2 well to respondent to the extent necessary to enable respondent to operate and produce the well in the Hunton Lime formation of the field; and petitioner, by so restricting its conveyance, retained possession of the well to the extent necessary for its operation and production in the Bartlesville Sand formation of the said field (R. 72, item 11). Respondent, shortly after October 1, 1947, shut in Stanolind-Christner No. 2 in the Hunton as an inefficient producer therein (R. 72, item 11). Petitioner has at all times continued production of the well in the Bartlesville (R. 29, item 13). On July 13, 1949, respondent, without any stated reason, demanded that petitioner cease its Bartlesville

1. See Palmer Oil Corporation, et al., v. Phillips Petroleum Company, et al., 231 P. (2d) 997, pending on appeal in this Court as Palmer Oil Corporation, et al., Appellants, v. Amerada Petroleum Corporation, et al., No. 301 (probable jurisdiction noted January 14, 1952); Kit C. Farwell, et al., Appellants, v. Amerada Petroleum Corporation, et al., No. 302 (probable jurisdiction noted January 14, 1952).

operation and return the well to respondent "completed in and capable of producting from the Hunton Lime reservoir only" (R. 31, item 24; R. 65). On September 9, 1949 (R. 31, item 25; R. 65-66), petitioner refused the demand and this suit followed.[2]

Respondent claimed in its petition to be entitled to the "exclusive" possession and use of Stanolind-Christner No. 2 for all purposes (R. 5). Petitioner denied the "exclusiveness" of the right in respondent and contended that it, petitioner, had the right to use the well for Bartlesville production so long as it did not interfere with respondent's Hunton operation (R. 13). Issue was joined on the respective contentions. The basic facts in the case were stipulated (R. 19-31). Among the matters stipulated as material to the issue thus joined were several resolutions adopted by the Operating Committee of respondent (R. 31, item 23; R. 51-64) with respect to the problem of the dually-completed wells within the unit area. These resolutions, as hereinafter shown, only indicate the *action taken* by respondent on the question; not the *reasons for the action.*

The trial court entered judgment for petitioner (R. 75). The court below sustained the trial court in finding that petitioner conveyed to respondent only possession of the Christner No. 2 well, not title; that petitioner's conveyance of such possession was restricted to the extent reasonably necessary to enable respondent to operate and produce the well in the Hunton formation; that, by so restrict-

2. Only 5 wells out of a total of 737 wells within the unit area of respondent were dually completed in and producing from both the Bartlesville and Hunton on October 1, 1947 (R. 28, item 12). One of the wells was subsequently abandoned as a noncommercial well in the Bartlesville. The owners of the remaining 4 wells, including petitioner, were made defendants in separate suits filed by respondent. The suit of respondent against petitioner was tried and, by agreement, the parties to the other suits have stipulated that each will be governed by the final result in this suit (R. 77-83).

ing its conveyance, petitioner reserved possession and the right to use the well in the operation and production of the Bartlesville formation; and that such right, although subordinate to the right of respondent, was one which petitioner was legally entitled to exercise so long as it did not interfere with the Hunton operations of respondent (R. 162). The court below then held, however, that petitioner, respondent and the trial court fell into error in believing that the trial court was the arbiter of the question of whether or not petitioner's Bartlesville operations interfered with respondent's Hunton operations (R. 163). The opinion of the court below makes clear that the Operating Committee of respondent, not the trial court, is the arbiter of the question of "when such operations constitute an abatable interference"; and that:

> "The province of the court, whose equitable processes are invoked, must therefore be limited to a determination whether the asserted power is arbitrary, capricious and without any rational basis in fact." (R. 163)

The court below then considered the various resolutions adopted by the Operating Committee, the recommendations of a five-man subcommittee to the Operating Committee and the testimony of respondent's petroleum engineer and concluded that the action of the Operating Committee in demanding the return of the well "was not arbitrary or capricious, but founded upon the technical knowledge and judgment of those charged with the duty and responsibility of managing and operating the unit." (R. 163-166)

We have no fault to find with the reasoning of the opinion handed down by the court below. We do, however, object to the action taken by the court; more specifically, to

the reversal of the judgment of the trial court with directions to enter judgment enjoining petitioner's operation of its Christner No. 2 well in the Bartlesville and requiring petitioner to return the well to respondent completed in and capable of producing only from the Hunton, rather than reversing the judgment of the trial court and remanding the case with directions to determine the issue of the reasonableness or unreasonableness of the Operating Committee of respondent in so demanding the return of the well.

Reasons for Granting the Writ.

1. The opinion of the court below is in direct conflict with *Saunders* v. *Shaw*, 244 U. S. 317, and with the principle of *Helis* v. *Ward, et al.*, 308 U. S. 365.

In the *Saunders* case, the plaintiff in error, an intervening defendant in the courts below, applied to this Court for a writ of error to review a decree of the Supreme Court of the State of Louisiana. The plaintiff in error contended that he had been deprived of due process of law by the Supreme Court of the State of Louisiana "because the case has been decided against him without his ever having had the proper opportunity to present his evidence." This Court granted the writ, reversed the judgment of the Supreme Court of Louisiana, and stated as follows:

> "Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view. The chief justice and Mr. Justice O'Neill were of opinion that the case should be remanded to the trial court, we presume upon the ground just stated. Probably the

majority of the Supreme Court thought that it was so plain on the uncontroverted facts that the case was within the principle of the *Myles Salt Co.* case that to remand it would be an empty form—a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in."

In the *Helis* case, the Court granted *certiorari* under the rule of *Saunders* v. *Shaw, supra,* but found that the Court of Appeals (5th Cir.) had not erred, because Helis had not properly preserved his point; that is, he had not asked for a remand of the case in his petition for rehearing to the Court of Appeals. The opinion in the case states:

"The fact that the case was tried by the District Court on an interpretation of the contract different from that of the Circuit Court of Appeals is not *per se* sufficient to cause a remand for a new trial under the rule of *Saunders* v. *Shaw, supra.* The production of the well was tested by the umpire in the manner provided in the contract and the results of that test were without objection admitted at the trial. Complete establishment of the facts necessary for application of the formula was thus made in the manner provided by the parties in their contract. To be sure, petitioner now asserts that on a new trial he would attack the competency and accuracy of the umpire's report—matters which were immaterial to the issues on the trial in view of the fact that it was not contested that no more than 3,000 barrels of oil a day could be produced through a 3/8-inch choke. But the difficulty with petitioner's position is that he has not preserved that point. On his petition for rehearing to the Circuit Court of Appeals, petitioner did not ask that court to allow him

a new trial in order to attack the umpire's report.[2] Nor was that the ground upon which the petition for *certiorari* was predicated."

"2. In addition to attacking the interpretation of the contract by the Circuit Court of Appeals, petitioner merely asserted, 'Your Honors have erred in predicating your opinion upon facts not contained in the record and upon facts which are disproved by the record'."

Petitioner, in this case, has done exactly what this Court stated should have been done in the *Helis* case and what the court stated was properly done in the *Saunders* case. Helis was granted *certiorari* under the rule of *Saunders* v. *Shaw, supra.* Petitioner, we think, is entitled to the same relief.

It is clear, in this case, that the "reasonableness" of the action of respondent's Operating Committee in demanding exclusive possession of the Christner No. 2 well was found by the court below to be the decisive question in the case (R. 162). It is equally clear that this all-important and decisive question was never litigated in the trial court. Neither petitioner nor respondent pleaded or otherwise contended, either in the trial court or the court below, that it was relevant to inquire into the "reasonableness" of the action of respondent's Operating Committee in demanding exclusive possession of the well. Respondent claimed an absolute right to exclusive possession of the well. Petitioner asserted an absolute right to withhold a partial possession. The court below said neither contention was correct, and that the "decisive question" was whether respondent's Operating Committee had acted arbitrarily or capriciously in demanding exclusive possession. Having raised this new issue, the court below then proceeded to decide it gratuitously upon pleadings and evidence which were never directed thereto. Although this

issue of fact has been decided against it, petitioner has never had an opportunity to introduce evidence thereon.

Recognizing and conceding the wide discretion of an appellate court to act finally in an equitable proceeding we, nevertheless, question the right of any court to take final action on an issue of fact never raised or litigated in the trial court when there is no "absolute warrant for the assumption" that remanding the case would not result in a different conclusion.

The court below cited various resolutions adopted by the Operating Committee, the recommendations of a five-man subcommittee to the Operating Committee and the testimony of respondent's petroleum engineer (R. 163-166) in support of its conclusion that the action of the Committee in demanding the return of the Christner No. 2 well "was not arbitrary or capricious, but founded upon the technical knowledge of those charged with the duty and responsibility of managing and operating the unit." (R. 166) The various resolutions adopted by the Operating Committee do not show the *reasons* which actuated the members of the Committee in voting the resolutions (R. 51-64). The recommendations of the five-man subcommittee to the Operating Committee do not show the *reasons* which actuated the members of the subcommittee in making their recommendations (R. 63). The testimony of respondent's petroleum engineer, which goes to the feasibility of the operation of a dually-completed well as a proper producing practice (R. 95-105), does not show the *reasons* which actuated either the members of the five-man subcommittee in recommending, or the members of the Operating Committee in demanding, the return of this well. Those reasons do not appear in this record. Petitioner is entitled to show them. How else can the court below determine with any degree of certainty

whether the action taken by the Operating Committee was unreasonable or arbitrary or without rational basis in fact?

The opinion of the court below shows that on May 3, 1949 (R. 164), the Operating Committee *rejected* a resolution requiring the return of the well; and, of course, it follows that such action likewise rejected the reasons cited by the court from the preamble of the resolution. Approximately two months later, on July 12, 1949 (R. 61, 165), the Operating Committee *adopted* a resolution requiring the return of the well; this resolution showed no reason for the action of the Committee. If permitted to be heard on the question of whether the Operating Committee's action was arbitrary, capricious or unreasonable in so doing, petitioner will show that the resolution of July 12, 1949, could have been adopted only as the result of certain members of the Operating Committee changing their votes after refusing to demand the well's return on May 3, 1949. What were the reasons for the change? Were they sound reasons or were they without rational basis in fact? The record may be searched for the answer without avail. Yet, that is the all-important fact that must be known before the court below can determine with any degree of certainty the very issue which it declared to be the decisive issue in this case. We do not suggest that the court below should assume an unreasonable and arbitrary action on the part of the Operating Committee. We do ask, however, that the Court not assume a reasonable and justified action on the part of that Committee. We merely wish to present direct evidence which, through no fault of petitioner, was never presented on the question found by the court below to be the decisive question in the case.

The net result of what we have said is that under the opinion of the court below the several members of the

Operating Committee of respondent who changed their votes between the two meetings of May 3 and July 12, 1949, have become the final arbiters of a matter which will cause petitioner to lose $80,000, *without any court knowing the reasons or motives for the action of those members.* That statement pinpoints the question. It will bear such scrutiny and analysis as the Court may wish to accord it. We should be permitted to establish the basis, or lack of basis, for the Committee action of July 12, 1949, and, if our surmise is correct, we feel that we can convince the Court that the action taken was arbitrary, unreasonable and without rational basis in fact.

In *Riley* v. *Titus* (D. C.), 190 F. (2d) 653, the court stated: "We cannot draw conclusions by speculation where the data necessary for certainty was not given in the trial court." In *Hughes* v. *Reed* (10th Cir.), 46 F. (2d) 435, the court below stated: "We are unwilling to enter any decree upon conjecture as to what the proof might have shown."

Yet, the court below, in this case, has drawn conclusions by speculation where the data necessary for certainty were not given in the trial court and has entered a decree upon conjecture as to what the proof might have shown. If we are bound to speculate, surmise and enter the realm of conjecture it is submitted that, rather than concluding that the action of the Operating Committee in demanding the return of the well "was not arbitrary or capricious but founded upon the technical knowledge of those charged with the duty and responsibility of managing and operating the unit," it is more reasonable to assume that the members of the Committee, having been improperly advised that respondent was entitled to the "exclusive" possession of the well, had *no reason* in demanding its return other than their erroneous belief that respondent was entitled to exclusive

possession. That is the most logical assumption that can be drawn from the position consistently taken by respondent from the time of its original petition in the case.

In *Duke Power Company* v. *Greenwood County,* 299 U. S. 259, this Court said:

> "Delusive interests of haste should not be permitted to obscure substantial requirements of orderly procedure. There is no exigency here which demands that these requirements should not be enforced. The cause was heard in the Circuit Court of Appeals upon a record improperly made up. That the cause may be properly heard and determined, we reverse the decree of the Circuit Court of Appeals and remand the cause with directions that the decrees entered by the District Court be vacated, that the parties be permitted to amend their pleadings in the light of the existing facts, and that the cause be retried upon the issues thus presented."

In other decisions, effect has been given to the same rule.[3]

2. The opinion of the court below is in direct conflict with the opinions of the United States Courts of Appeals which have repeatedly recognized and followed the rule. In *Fifth Third National Bank* v. *Johnson,* 219 Fed. 89, 95, the court stated:

> "* * * Since the District Court sustained the defendants' contention that this issue was not on trial, it is probable that they did not take their full proofs on that subject, and a final decision on the present record might be unjust. Under these unusual conditions, we see no way to insure that the full controversy shall be finally decided, in this case and upon a proper rec-

3. Collins v. Yosemite Park & Curry Co., 304 U. S. 518; United States v. Rio Grande Dam & Irrigation Co., 184 U. S. 416; Willing v. Binenstock, 302 U. S. 272; and Erie R. Co. v. Tompkins, 304 U. S. 64.

ord, save to direct that the decree be reversed as to appellees and the case remanded * * *."

See the cases cited in the footnote to the same effect.[4]

3. Review by this Court is warranted because of the importance of orderly procedure and due process to all litigants. The correctness or incorrectness of the conclusion reached by the court below that the action of respondent's Operating Committee in demanding the return of the Christner No. 2 well "was not arbitrary or capricious but founded upon the technical knowledge of those charged with the duty and responsibility of managing and operating the unit," is not the material factor in this petition. The material factor is that the conclusion was reached by that court without petitioner having been given an opportunity to present its evidence on the question. To deny petitioner that right is to deprive petitioner of its property without due process of law contrary to the Fifth Amendment to the Constitution of the United States.

Conclusion.

For the foregoing reasons this petition for *certiorari* should be granted.

Respectfully submitted,

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4. Columbus Gas & Fuel Co. v. City of Columbus, 55 F. (2d) 56; Wilson v. Spencer, 261 Fed. 357; Underwood v. Commissioner of Internal Revenue, 56 F. (2d) 67; Finefrock v. Kenova Mine Car Co., 22 F. (2d) 627; and Hamilton Gas Co. v. Watters, 75 F. (2d) 176.

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In The
Supreme Court of the United States
OCTOBER TERM, 1951

No. 607

STANOLIND OIL & GAS COMPANY,
Petitioner,

VERSUS

WEST EDMOND HUNTON LIME UNIT,
A body politic and corporate,
Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In The
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No. 607

STANOLIND OIL & GAS COMPANY,
Petitioner,

VERSUS

WEST EDMOND HUNTON LIME UNIT,
A body politic and corporate,
Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The only question presented by the Petition for Writ of Certiorari is whether or not petitioner is entitled to another trial in order that it may have another opportunity to explore a phase of the case which petitioner neglected at the first trial. Since the complete answer to petitioner's complaint concerning the judgment of the court below is found in the Record, this memorandum will be confined to discussion of the facts.

This action was commenced by respondent in a State court of Oklahoma to enjoin petitioner from continuing to use a certain oil and gas well, respondent claiming to be entitled to exclusive possession of the well and its appurtenant equipment. After removal proceedings, trial in the United States District Court for the Western District of Oklahoma resulted in a judgment for petitioner. On appeal that judgment was reversed by the United States Court of Appeals for the Tenth Circuit, with direction to enter judgment for respondent granting the injunctive relief prayed for.

As noted in petitioner's statement, respondent was created under the so-called "unitization statute" of the State of Oklahoma (Sections 286.1 to 286.17, Title 52, Okl. Stat. Ann.). This statute was enacted in 1945 as a conservation measure designed to make possible the unitized operation of an entire reservoir or common source of supply of oil and gas, in order that a greater recovery might be had for the benefit of all interest owners. Under unitization, royalty interests and operating rights in separately owned tracts of land are pooled or "unitized" so that the owners of interests in a particular tract share in production from the entire reservoir instead of receiving all of the oil and gas produced from their tract. The owner of the operating rights in a particular tract, instead of bearing all the expenses incurred on that tract, bears a proportionate share of the expenses

incurred in development and operation of the entire reservoir.

Administration of the unitization statute is entrusted to the Oklahoma Corporation Commission, which is authorized to order creation of a unit, after notice and hearing upon application filed by lessees (*i.e.*, owners of oil and gas leases or other operating rights) of lands within the area being unitized. In creating a unit the Commission must prescribe or approve "a plan of unitization" which in effect is the charter of the unit. The statute requires the plan of unitization to include suitable provisions on such matters as the following:

(a) Apportionment of production among the separately owned tracts within the unit area in such manner as to permit each interest owner to receive his fair and equitable share of unit production.

(b) The apportionment of expenses incurred in the unitized operation among the lessees of the separately owned tracts within the unit area.

(c) The procedure and basis upon which wells, equipment and other properties of the several lessees are to be taken over and used for the unitized operation, with suitable provision for adjustment of investments made therein by the several lessees.

(d) Creation of an operating committee to have "general over-all management and control of the unit and the conduct of its business and affairs," each lessee within the unit area being entitled to representation on the operating committee, with a voting interest proportionate to his interest in the unit.

A unit thus created is, in the words of the statute, a "body politic and corporate." Its governing body is the operating committee provided for in its plan of unitization, and its members are lessees or owners of operating rights in the unitized reservoir.

The facts concerning creation of respondent and the drilling and dual completion of the well here in question were stipulated (R. 19, *et seq.)*. Copy of the Corporation Commission order creating respondent, and copy of the plan of unitization approved in connection therewith were attached as exhibits to the Answer filed by petitioner in the trial court. Respondent was created by the Corporation Commission Order entered July 29, 1947, for the unitized operation of the Hunton Lime Formation, a reservoir of oil and gas in the West Edmond Field, Oklahoma. Unitization became effective October 1, 1947, at which time respondent took over the operation and further development of the unitized reservoir. The plan of unitization provided for conduct of operations through a "unit operator" under respondent's direction. With respect to wells drilled into the unitized reservoir prior to the effective date of unitization, the plan provided (R. 23-25):

(a) That the lessees would "deliver possession" of such wells and all lease and other equipment used in the operation thereof to the unit operator.

(b) That each lessee contributing a well would receive a credit of $50,000 as the intangible value

thereof, every forty-acre tract not contributing a well to be charged a percentage of the total of such credits.

(c) That well equipment such as casing, tubing, derricks, tanks, separators, etc. would be inventoried and valued, and adjustments made among the lessees to the end that each lessee "instead of separately owning the equipment delivered to the unit" by such lessee "will have exchanged the same for an undivided interest in and to all the equipment so taken over and acquired by the unit, and will have paid or have been paid, as the case may be, for any difference in value."

The well here in question was completed by petitioner in 1945 as a well producing from the Hunton Lime Formation within the unit area affected by creation of respondent. Application for creation of respondent was filed with the Corporation Commission on January 29, 1947, and 13 days prior thereto petitioner applied to that Commission for permission to effect dual completion of its well, in order that the same well might be used to produce gas from the Bartlesville Sand Formation and oil from the Hunton Lime Formation, the two formations being separated by an interval of about 280 feet (R. 20). However, the dual completion was not effected until April, 1947, and prior thereto on February 24, 1947, petitioner executed and thus assented to the plan of unitization later approved by the Corporation Commission in creating respondent (R. 21).

When unitization became effective on October 1, 1947, there were 737 wells producing from the Hunton Lime Formation within the unit area, only 5 of which had been dually completed. On September 24, 1947, before unitization became effective, respondent's operating committee held a meeting at which consideration was given to these dually completed wells, with the result that temporary permission was granted for use thereof for Bartlesville gas production (R. 52). From time to time the operating committee extended the permission thus granted until, at a meeting held on July 12, 1949, respondent's operating committee terminated such permission and ordered the dually completed wells surrendered for production from the Hunton Lime Formation only (R. 61-62).

In the adjustment for wells and equipment provided for in the plan of unitization, petitioner received full credit for the well here in question and the equipment appurtenant thereto, without any deduction by reason of its dual completion (R. 93). By virtue of this adjustment, since petitioner's total interest in the unit was slightly less than ten per cent, petitioner's *ownership* in the well and its appurtenant equipment was reduced to an undivided interest of slightly less than ten per cent (R. 29). Ownership of the remaining undivided interest of about ninety per cent, and ninety per cent of the burden of investment in the well, were transferred to other lessees of the unit. Admittedly, respondent has no

"title" to the well or its equipment, the title being vested in all lessees of the unit and respondent's right being limited to rights of possession and use.

The trial court based its judgment for petitioner on the doctrine of comparative injury or balancing of conveniences, finding that use of the well in question for Bartlesville gas production was more valuable than use thereof for Hunton Lime production. The trial court also found that respondent's right was one of possession for a limited purpose and that all other rights were "reserved" to petitioner (R. 74). In reversing and directing judgment for respondent, the Court of Appeals concluded that respondent's operating committee had the power to determine whether or not petitioner should be permitted to use the well for Bartlesville production and that the province of the court was "limited to a determination whether the asserted power is arbitrary, capricious and without any rational basis in fact" (R. 163). Petitioner's only complaint concerning the judgment of the court below is that no evidence was introduced in the trial court concerning the reasonableness of the action taken by respondent's operating committee, and therefore petitioner is entitled to a new trial in order that it may have opportunity to submit such evidence. This is not a fair statement of the evidence introduced.

Petitioner plead that a judgment requiring surrender of the well would be inequitable. This defense placed in issue all things which would cause respondent's position

to be considered inequitable. At the trial, petitioner produced a petroleum engineer who testified that respondent did not need the well to produce oil from the Hunton reservoir; that petitioner's use of the well did not interfere with respondent's use thereof; that the dual completion added no hazard to the operation and that respondent would lose but little oil if denied the use of the well. (See the testimony of Darl D. Gillespie, Tr. 120 to 136.) Respondent offered evidence to prove the Unit's need for the well. (See the testimony of Frank H. Willibrand, a petroleum engineer, Tr. 95 to 120.) Mr. Willibrand testified that petitioner's control thereof interfered with the Unit's use; that the Unit needed the well to produce Hunton oil; that Hunton oil would be lost to the Unit if it was denied the use of the well. All this evidence was pointed at the issue of whether respondent had a rational basis in fact for requiring delivery to it of the well. It was after a review of this evidence that the Circuit Court reached the conclusion that the action of the Unit Operating Committee in requiring delivery of the well to the Unit was not arbitrary or capricious.

The ultimate issue presented in this case is whether or not respondent is entitled to possession of the well in dispute, to the exclusion of petitioner. The *fact* that respondent's operating committee had considered the matter and ordered surrender of the well to respondent was brought into the case by stipulation at respondent's in-

stance, as evidence bearing on the ultimate issue, respondent's position being that the action of the operating committee was binding on petitioner. In the trial court petitioner elected to base its defense in equity and on the assertion of an absolute right of which petitioner could not be deprived by any action of the operating committee. The latter defense made the actions taken by respondent's operating committee immaterial. The first defense was decided adversely to petitioner by the Circuit Court.

The rule announced by this Court in *Saunders* v. *Shaw et al.*, 244 U.S. 317, has no application in these circumstances. On trial of that case the plaintiff below had introduced evidence which the trial court later excluded as inadmissible under the pleadings, and solely because of this ruling an intervening defendant omitted to proffer evidence contradicting that which had been introduced by plaintiff. On appeal the State Supreme Court reversed the trial court and entered judgment for the plaintiff below on the basis of the evidence which had been excluded by the trial court. This Court, in reversing and ordering a new trial, held that the intervening defendant had no duty to proffer evidence in opposition to other evidence that had been ruled out by the trial court.

On trial of the instant case the fact that respondent's operating committee had acted was not ruled out by the trial judge at any time. Until the trial court handed

down his decision, neither petitioner nor respondent knew to what extent the decision might be governed by that fact. Hence, petitioner's omission to offer evidence concerning the reasonableness of the operating committee's action, was not based on any ruling made by the trial court or any position taken by respondent. Instead, petitioner's omission was based on its own view of its rights.

Petitioner therefore seeks a new trial solely because the Court of Appeals placed on respondent's plan of unitization an interpretation different from that contended for by petitioner and adopted by the trial court. As stated by this Court in *Helis* v. *Ward et al.*, 308 U.S. 365, also relied on by petitioner:

> "The fact that the case was tried by the district court on an interpretation of the contract different from that of the Circuit Court of Appeals is not *per se* sufficient to cause a remand for a new trial under the rule of *Saunders* v. *Shaw, supra.*"

Unlike the injured parties in the *Saunders* and *Helis cases*, petitioner relied in the trial court on a defense chosen by it with full knowledge of respondent's position, and not upon a defense forced upon it by the trial court. Petitioner therefore has had its day in court with ample opportunity to present every defense available to it. The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

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